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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1638

GENNARO J. COPPOLA
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To The Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States

The petitioner Gennaro Coppola respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 17, 1970.

The opinion of the Court of Appeals (Lumbard, Chief Judge and Friendly, Circuit Judge and Judd, District Judge) is thus far unreported, and is reprinted in its entirety in an appendix hereto. Petition for rehearing was denied without opinion. There was no written opinion filed in connection with the district court proceedings.

STATEMENT OF JURISDICTION

The judgment and opinion of the Court of Appeals, *sub nom United States v. Gennaro J. Coppola* et al, from which review is sought, was entered on April 17, 1970. A timely petition for rehearing was filed and was denied on May 6, 1970.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Did the court err in charging that the jury could infer from the defendant's possession of the bonds that he had knowledge that the bonds were stolen and that he transported the bonds in interstate commerce, when there is not a substantial assurance that the presumed fact is more likely than not to flow from the proved fact.

2. Did the court err in allowing the government to introduce evidence concerning the defendants' character, disposition and reputation on its case in chief.

STATUTES INVOLVED

18 United States Code Section 2314:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged,

altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 United States Code Section 2315:

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $5000 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited: or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, moving as, or which is a part of, or

which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

On March 28, 1967 a three count indictment was returned against the defendants charging (1) that the defendants transported stolen securities from New York to Bridgeport and Fairfield, Connecticut (18 U.S.C. §2314); (2) that the defendants received, concealed and pledged these securities (18 U.S.C. §2315); and (3) that the defendants, along with Anthony Testo, conspired to violate 18 U.S.C. §§2314 and 2315. This was indictment No. 11932. (19-22) * On October 16, 1967 a one count indictment charging a conspiracy to violate 18 U.S.C. §2314 was returned against the defendants. This indictment, No. 12085, charged that the defendants conspired, along with Testo, to transport stolen securities out of the State of Connecticut. (23-24) On the government's motion the indictments were consolidated for trial.

Pleas of not quilty were entered on all counts of both indictments and a trial to a judge and jury was held in New Haven, Connecticut on December 11, 1967, lasting through December 29, 1967. At the close of the evidence, the government moved that count three of the indictment No. 11932 be dismissed, and the motion was granted. (6) At the close of the taking of evidence Judge Timbers denied defendant

* All page references are to the joint appendix; the page numbers are at the bottom of the page in the two volume appendix.

Coppola's Motion to Elect, Motion for Mistrial, and Motion for Judgment of Acquittal. (6) On December 29, 1967 the jury returned guilty verdicts on all counts as to both dedendants. (6)

On January 29, 1968 Judge Timbers imposed the following sentences:

Coppola:

(#11932) 10 years imprisonment on Count 1. 10 years imprisonment on Count 2. Fined $10,000 on both counts, for a total of $20,000.

(#12085) 5 years imprisonment on Count 1, and a $10,000 fine. Sentences are to run concurrently.

Connelly:

(#11932) 5 years imprisonment on Count 1, 5 years imprisonment on Count 2. Fined $5,000 on both counts, for a total of $10,000.

(#12085) 5 years imprisonment on Count 1, and a $5,000 fine. Sentences are to run concurrently.

Timely notices of appeal were filed on behalf of both defendants and in an opinion of April 17, 1970 the United States Court of Appeals for the Second Circuit affirmed in part and reversed in part. The two counts in indictment number 11932 were affirmed, and the conviction on indictment number 12085 was reversed. A motion for rehearing was filed and was denied without opinion on May 6, 1970.

STATEMENT OF FACTS

George Plave, head cashier at Newburger, Leob & Co. in New York City (100) testified that on October 25, 1966 a

clerk employed by the brokerage firm discovered the absence of a bond from the firm's vault. Thereafter, physical counts and the inventories of bonds conducted on October 26, 1966 and December 21, 1966 by the firm of Peet, Marivick and Mitchell showed a number of bonds to be missing. The last audit prior to discovery of the missing bonds was August 26, 1966, and at that time, no bonds were missing. (183)

Anthony Testo was the government's chief witness, and was named as a co-conspirator with the two defendants in the two indictments in this case, but was not named as a defendant. Testo owned three pharmacies in the Bridgeport and Fairfield area. (107) He testified that he had known Coppola for about fifteen years (108) and that about February 1, 1967, he met with Coppola. According to Testo, Coppola advised him that he, Coppola, could get Testo a loan. (109). Testo was a businessman badly in need of money for his drug stores. (109) About the first week in February Coppola made Testo a loan of $3,000. According to Testo, Coppola indicated he could get some stocks and bonds that could be used as collateral for a loan. (110)

After the original conversation concerning the bonds, and a call on February 10, Testo claimed that on or about February 20, 1967, Coppola came to one of his drug stores and gave him a slip of paper containing the list of bonds which would be available for use as collateral. (112-114)

Testo further claimed that he took the list to Mr. DePalma at the Connecticut National Bank. (121) On or about February 23, 1967, according to Testo, Mr. Coppola came to his drug store and gave him an Intermediate Bond of a $5,000 denomination and allegedly said he, Coppola, could get $45,000 more in bonds. (122) Testo pledged the

bond as collateral at the Mechanics and Farmers Bank on or about February 24, 1967 and received $3,500 as a loan. The loan was obtained at the Fairfield Branch from Mr. McGrath. (131)

Thereafter, between February 24th and March 1st, 1967, Testo claimed to have had several telephone conversations with Coppola. (136, 140) Testo claimed to have met Coppola on February 27, and that he gave Coppola $1,000. (141-142) On March 1st, Testo met Coppola at the Howard Johnson's Parking Lot in Fairfield, Connecticut at about 5:00 in the afternoon. (148-149) At that time, Coppola was accompanied by the defendant, Connelly, and according to Testo, Coppola introduced Connelly as "my partner, John." (153)

Testo claimed that a discussion ensued, participated in by both Connelly and Coppola, relative to how much Testo would pay for the use of bonds to be furnished to him as collateral for loans. At that time, no agreement was reached as to the price which Testo would pay. (154) During the discussion, Testo was told that the bonds would come "from a friend down the line." (159) Testo said it was *his* understanding that this meant "New York." (160)

Testo further claimed that on Thursday, March 2nd, he had another telephone conversation with Coppola at which time it was agreed to meet at Kallay's Restaurant off the Black Rock Turnpike in Fairfield. (164) According to Testo, in one of the two telephone conversations on March 2nd, he and Coppola agreed that he, Testo, would pay $6,000 for the use of the bonds to be delivered to him. (169) Testo further claimed that in the afternoon of March 2nd, he and his driver, a Mr. Gulli, drove to Kallay's Restaurant and when they arrived, Testo got out of the car and went

over to another automobile where Coppola and Connelly were waiting. Testo said that a discussion enused relating to when he would receive bonds to take to the bank. He then claimed that Coppola got out of the car and went to make a telephone call to "a motel somewhere down the line" in order to arrange to obtain the bonds for delivery to Testo. (173)

The witness Gulli who had accompanied Testo to the parking lot and who remained in Testo's car, was parked near the telephone booth and he observed Coppola enter the booth to make the call. He was able to observe that Coppola dialed directly in making the phone call and did not require the services of an operator to complete his telephone call from the pay booth. (592-593)

Testo claimed to have talked with Coppola next by telephone on March 4th and again on March 6th and March 7th, 1967. (118) Testo claimed that in the March 7th telephone conversation arrangements were made for a meeting at the Worden Avenue exit of the Connecticut Turnpike in Bridgeport, (180) and that later that morning, he did meet with Coppola and Connelly. (182) Testo claimed that at that meeting, Coppola handed him four $5,000 Bonds and on Wednesday, March 8th, Testo took four bonds of the total face value of $20,000 to the Mechanics and Farmers Bank in Fairfield and pledged them for a $14,000 loan. (185, 188)

Thereafter. Testo claimed to have met Connelly and Coppola at the driveway of his drug store and tendered a $6,000 check which was refused. He said that Coppola accompanied him into the drug store and instructed him to cash the check so that the payment could be made in cash instead of by check. (198)

According to Testo's testimony, the following morning, Coppola came to his office to pick up the $6,000 in cash and also delivered three $10,000 Federal Intermediate Bonds. (204) Testo said he gave Coppola $6,000, though the amount turned out to be short. (207) Testo took the three Intermediate Bonds to the bank later that morning, and at that time, the banker, Mr. McGrath pointed out that the bonds had already matured. (208) McGrath offered to keep the bonds and to process their redemption but Testo refused to leave the bonds and requested their return. (209-211). Mr. McGrath returned two but kept one of the bonds and thereafter checked with the authorities. (213)

In the meantime, Testo returned to his drug store with the two bonds and he claimed that later in the afternoon Coppola came into the store about 1:00 p.m. Testo testified that the defendants wanted the matured bonds back. (219)

On March 9, 1967, after Testo had left the bank, he was contacted by agents of the F.B.I. and thereafter, in a telephone conversation with Coppola, arranged a meeting at the Mechanics and Farmers Bank for the next morning, March 10th. (221)

Coppola, accompanied by Connelly as a passenger in his car, drove into the parking lot of the Bank on March 10, 1967 where they were apprehended by agents of the F.B.I. (363) At the time of their arrest, a sealed envelope containing several bonds was found under the driver's seat in Coppola's automobile. (363)

All of the bonds that were pledged to the bank and those bonds which were in the sealed envelope were identified as bonds which were missing from Newberger, Loeb & Company.

I. The Trial Judge Erred in Charging The Jury That It Could Infer From Defendant's Possession Of The Bonds That He Had Knowledge That The Bonds Were Stolen And That He Transported Them In Interstate Commerce.

The bonds were stolen sometime between August 26, 1966, the date of the last audit prior to the discovery of the theft, and October 25, 1966 when a clerk discovered the absence of a bond from the firm's vault. Testo claimed that he received a bond from Coppola on or about February 23, 1967. Thus, a period of between four and six months had elapsed between the time the bonds were stolen and the time there was evidence of the defendant's possession of the bonds.

Under Count One of the Indictment number 11932, regarding transportation of securities in interstate commerce knowing the same to have been stolen, the court charged that the jury could infer from the defendants' possession of the bonds that they transported them in interstate commerce and that they knew that the bonds had been stolen. In the Second Count of the Indictment, regarding receiving securities constituting interstate commerce, the court referred back to its previous charge on the inferences that could be drawn from the defendants' possession of stolen bonds.

Counsel for Coppola made timely objection to the charge on inferences from possession and fully stated the legal grounds for the objection. (710-712). The judge overruled these objections and the request that he further charge the jury. (727)

By charging the jury that these inferences could be made the judge erred in that there is insufficient rational con-

nection between possession of stolen bonds (the fact alleged) and the conclusion that the defendant had knowledge that the bonds were stolen and that the defendant transported the bonds in interstate commerce (the facts presumed). The charge denied the defendant Coppola due process of law under the Fifth Amendment to the United States Constitution. Further, by effectively requiring the defendant at his peril to come forward with evidence and testify to explain his possession the charge violated defendant Coppola's Fifth Amendment privilege against self incrimination.

A. The Minimum Test of the Constitutionality Of An Inference Is Whether It Can Be Said With Substantial Assurance That The Presumed Fact Is More Likely Than Not To Flow From The Proved Fact On Which It Is Made To Depend.

The minimum standard that should be applied by this Court to test the constitutionality of the charge in this case is the same as was recently applied in *Leary v. United States* 395 U.S. 6 (1969) to test a criminal statutory inference.

> "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* at 36.

The standard set forth in *Leary* was recently applied in *Turner v. United States*, 90 S.Ct. 642 (1970), where the Court held "the inference" as to knowledge of illegal importation of heroin passed the *Leary* test, while the same inference as to cocaine failed. As odd as it may sound, stolen securities are more like cocaine than heroin. The "posses-

sion of heroin is equivalent to possessing imported heroin." 90 S.Ct. at 648. But certainly the possession of stolen securities in Connecticut is not *equivalent to* having transported them from New York, or knowing they were stolen in New York and transported to Connecticut. To run through the six tests set forth in *Turner,* one can say (1) it is plain that it is legal to have bonds in Connecticut, and bonds are not in and of themselves contraband. (2) Bonds are sold and possessed in Connecticut and New York. (3) There is enormous evidence that bonds are distributed in Connecticut. (4) No law prohibits the sale and distribution of bonds or securities. (5) The "flow" of bonds is subject to little control, and bonds can be legally carried around by any person. (6) Stolen bonds look just like those not stolen, and nothing about bonds would "tip" the holder off as to whether the bonds were stolen, and if stolen, whether in Connecticut or out. The "inference" concerning stolen bonds does not meet the minimum standard test in *Leary* as applied in *Turner.*

In *Leary* the Court expressly left open the question of whether a criminal presumption must also satisfy the criminal "reasonable doubt" standard of proof if the crime charged or an essential element thereof depends upon its use. *Id.* at 36fn. 64. However, the importance of the criminal context was stressed in the carefully considered opinion of Judge Frankel in *United States v. Adams,* 293 F.Supp. 776 (S.D.N.Y. 1968), which anticipated the decision in *Leary* in other respects. In dealing with a statutory inference that permitted the jury to infer that one found in possession of marijuana knows it to have been illegally imported, Judge Frankel stated:

> "[W]hen we allow the drawing of an inference like the type herein [sic] issue, we must be telling juries . . .

that the inference is one sustained by substantially more than a perponderance of the evidence, that the probability is far in excess of 50-50, that it is sufficient to warrant a reasonable man's being convinced "to a moral certainty" of the correctness of the inference. See e.g. *United States v. Bilotti*, 380 F.2d 649, 654 (2d Cir.), cert. denied, 389 U.S. 944, 88 S. Ct. 308, 19 L.Ed. 2d 300 (1967)." 293 F.Supp. at 784 (emphasis in original)

Judge Frankel went on to state:

"The force of this conclusion should be evident quite apart from the profound subversiveness of a view that would countenance our telling juries in one breath that proof of all elements must be beyond a reasonable doubt while effectively saying in the next breath that the burden on some or all elements may actually be a good deal less than substantial." 293 F.Supp. at 784.

In testing the constitutionality of a charge on an inference in a criminal case, the inference should be measured against the standard of "reasonable doubt."

B. The Standards Announced In The Decisions On Statutory Inferences Are Applicable To The Charge In This Case.

The decisions in both *Leary* and *Adams* dealt with statutory inferences which merely *allowed* the inference of knowledge from possession unless possession could be satisfactorily explained. The exact language there involved was: "such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." 395 U.S. at 30. The charge in the instant case had substantially the same meaning to the jury. It allowed the jury to draw the inferences, of

knowledge that the goods were stolen and that the defendants transported the goods, from the fact of possession.

The court went beyond merely telling the jury that it could consider the evidence of possession in reaching its determination of whether the defendants knew the bonds were stolen and whether they transported them from New York to Connecticut. In regard to transportation of the bonds, the court charged:

> In connection with the inference which the government asks you to draw concerning the interstate transportation of the bonds, I charge you that the possession in one state of property recently stolen in another state, if not satisfactorily explained, is *ordinarily* a circumstance from which the jury may reasonably draw the inference *and find,* in light of all the surrounding circumstances shown by the evidence in the case, that the person or persons in possession transported the property in interstate commerce.
>
> If the jury should find beyond a reasonable doubt from the evidence in the case that the bonds described in the indictment were recently stolen in New York and the bonds were in the possession of the accused in Connecticut, the jury would *ordinarily be justified* in drawing *from those facts* the inference that the accused transported the bonds from New York to Connecticut unless possession of the recently stolen bonds by the accused in Connecticut is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case." (636-637) (emphasis added).

The charge with respect to the inference that defendant *knew* that the bonds were stolen was put in substantially identical language. (641-644). These portions of the charge

were referred back to by the judge when he charged the court on the second count of the indictment (652-654).

While it is true that the court did make cursory reference to other circumstances of the case in this charge (i.e. "in light of all the surrounding circumstances") it cannot be denied that the overwhelming emphasis was placed on the inferences that could be drawn from possession. No other specific circumstances were mentioned. Moreover, in the second paragraph of the charge the judge explicitly told the jury that it would "ordinarily by justified" in finding that defendants *transported* the bonds from possession alone. No other circumstances were mentioned. The repeated use of the word "ordinarily" could only have had the effect of giving overwhelming emphasis to the "inference" that could be drawn.

United States v. Lefkowitz, 284 F.2d 310 (2d Cir. 1960) is relevant in evaluating the charge in this case. In *Lefkowitz* the court condemned a charge couched in terms of a "burden" on the defendant to explain his possession of recently stolen goods. The court's charge that possession "ordinarily" justifies an inference that defendant transported the bonds and knew they were stolen, clearly put the burden on defendant of explaining the possession and accorded more than its normally probative weight to the evidence of possession.

The court below did state that the jury was not *required* to draw the inference, but that was equally true of the presumption in *Leary* and *Adams*. The court below also stated that the defendants had no burden to explain their possession and that the burden was on the government to prove all elements of the crime. (637, 642) But here again *Lefkowitz* is relevant, because the court struck down an

instruction couched in terms of "burden" even where it was joined with an entirely proper phrasing in terms of inference. 284 F.2d at 313. As stated by the Supreme Court in *Bollenback v. United States*, 326 U.S. 607 (1946) which involved an erroneous charge on an inference of interstate transportation of stolen bonds from later possession:

> The influence of the trial judge on the jury is necessarily and properly of great weight . . . and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." Id. at 612 (citation omitted).

By telling the jury that it could draw the inference the judge allowed the jury to draw an "irrational" and "arbitrary" inference, and by twice stating that the jury would "ordinarily" be justified in drawing the inference the judge afforded to the evidence of possession more than its otherwise probative force. The first consideration offends the standard for testing the constitutionality of the inference established in *Leary*. By affording the evidence more than its normally probative weight the court went beyond the inference encountered in *Leary*.

C. The Period Of Time Between The Theft And Possession, Four To Six Months, Is Too Long For A Rational Inference To Be Drawn As To Defendant's Knowledge That The Bonds Were Stolen And That He Transported Them In Interstate Commerce.

It is clear, even in the decisions rendered prior to the tightening of the constitutional standards relevant to permissible inferences, that possession of goods stolen a period

of between four and six months prior to their discovered possession was questionable possession of "recently" stolen goods.

Thus, in *Van Gorden v. United States,* 21 F.2d 939 (8th Cir. 1921) the Court held that possession of stolen post office box keys 87 days after the theft was insufficient to sustain a finding of quilty knowledge that they were stolen, much less the presumption that the possessor was the thief. The Court noted that the evidence failed to exclude reasonable hypotheses other than guilt and that guilt must be proved beyond a reasonable doubt. As post office box keys are not ordinarily articles of commerce as are bonds, the conclusion of that court applies with even more force in the present circumstances.

In *Carter v. State of Nevada,* 415 P.2d 325 (1966) the Supreme Court of Nevada struck down a statute making possession of stolen property within 6 months of the theft sufficient evidence to authorize conviction for receiving stolen goods. As held by that court:

> Though possession is relevant and admissible evidence, it does not necessarily point to guilt. The defendant may have purchased the goods for fair value, or they may have been given to him. In either case, he would not be quilty under the statute. Clearly, the statutory presumption of guilt from possession is arbitrary and cannot satisfy due process requirements, nor may it be said, in these circumstances, that the presumption meets the burden cast upon the state to prove the defendant's quilt beyond a reasonable doubt. 415 P.2d at 327.

Following the *Carter* decision and overruling its own 1966 decision, the Oklahoma Court in *Payne v. State,* 435 P.2d 424 (Okl. Cr. 1967) declared unconstitutional a statute

making possession of allegedly stolen property a rebuttable presumption of guilt, stating:

> "We find that there is no reasonable connection between possession (the fact proved) and knowledge that the goods were stolen (the fact presumed), in the absence of some evidence to the contrary, and therefore such presumption is arbitrary." 435 P.2d at 428.

We are not unaware of the difficulty of drawing a line between situations where the inference is permissible and where it is not. Certainly there are cases allowing an inference from possession where the time lapse is longer than here. *Lee v. United States* 363 F.2d 469 (8th Cir. 1962), *United States v. Allegrucci* 299 F.2d 811 (3d Cir. 290 1962) On the other hand it is not an appropriate solution to the problem to let every such question go to the jury accompanied by a charge such as the one found in this case. The jury should not be charged that possession can justify the inference of knowledge and transportation where the time lapse between theft and possession is between four to six months.

The minimum constitutional standard set down in the *Leary* decision, *supra,* is "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." To paraphrase *Leary*, in order to determine the constitutionality of the "knowledge" inference, one must have direct or circumstantial data regarding the beliefs of bond holders generally about tht source of their bonds. Such information is plainly not within specialized judicial competence or completely common place. *cf.* 395 U.S. at 38. The Court goes on to note that the presumption's constitutionality is "highly

empirical", thus requiring a canvas of available pertinent data. The Court found it impossible in the case before it to justify the inference. "[T]he materials at our disposal leave us at large to estimate even roughly the proportion of marijuana possessors who have learned in one way or another the origin of their marijuana." 395 U.S. at 52.

Similarly, this Court cannot say with substantial assurance that one in possession of stolen bonds four to six months after their theft is more likely than not to know that the bonds were stolen or that he transported them in interstate commerce. As was the case with marijuana, there are ways in which the bonds could have been acquired without such knowledge. The defendant's contention, however, is not that evidence of possession is not probative, but that the charge on the inferences that can be drawn from possession gives such evidence more than its probative weight.

D. The Judge's Charge On The Inferences That Could Be Drawn from Possession Effectively Required Defendant At His Peril To Testify To Explain His Possession.

Throughout his charge on the inferences which the jury could draw from defendant's possession of the bonds the trial judge stressed the importance of the defendant's explaining the possession. (637-638, 641-642). This merely reinforces the natural tendency of letting guilt rest on possession alone. As stated by Mr. Justice Black dissenting in *United States v. Gainey*, 380 U.S. 63 (1965) in the context of an inference being drawn from possession:

> The undoubted practical effect of letting guilt rest on unexplained possession alone is to force a defendant to come forward and testify, however much he may think

doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony. 380 U.S. at 87.

In explaining what he meant by "explaining" the judge illustrated by examples from positive testimony either of the defendant Connelly or others. (638, 642) Nowhere did the court attempt to say how Coppola had "explained" his possession.

Though the court mentioned that the burden of proof continued to rest on the government, this could not possibly outweigh the practical effect on the jury of requiring some sort of positive or testimonial explanation from the defendant of his being found with stolen bonds. This placed an unconstitutional burden on defendant's exercise of his Fifth Amendment right not to testify. It is significant that the court, in illustrating an "explanation" said nothing of Coppola's claims, made by way of cross examination of Testo and Agent Smith, that the bonds were not Coppola's. The charge itself showed that even the judge considered Coppola's failure to testify as a failure to provide *any* explanation of possession of stolen goods.

II. The Court Erred In Allowing The Government To Introduce Evidence Concerning The Defendants' Character, Disposition, And Reputation On Its Case In Chief.

On rebuttal the government called Joseph Gulli to testify. Mr. Gulli was an employee of Testo, and had driven Testo to some of the meetings with Coppola and Connelly.

On redirect examination Mr. Heyman asked the following:

[Mr. Heyman]: Q. Were you reluctant for some reason to testify in this case?

Mr. Jacobs: I object to it.

The Court: Overruled

Mr. Heyman: Q. You may answer that.

A. Yes.

Mr. Heyman: All right. No furthur questions.

Recross Examination by Mr. Fitzgerald:

Q. And why was that?

Mr. Jacobs: Objected to.

The Court: Overruled.

A. Well, I have never been in a—you know—Federal Court before. I didn't know what it was all about.

Mr. Jacobs: No further questions.

Redirect examination by Mr. Heyman:

Q. With respect to your reluctance in this case to testify, did it have anything to do with who were the defendants Mr. Gulli?

Mr. Jacobs: I object to it and move for a mistrial, and ask the jury be excused.

The Court: I overrule the objection. I deny the motion.

By Mr. Heyman:

Q. Can you answer that yes or no?

A. Yes, yes.

Q. The answer is yes?

A. Yes.

Mr. Heyman: No further questions. (594-598)

On recross Mr. Fitzgerald unsuccessfully sought to avoid the clear meaning of Gulli's testimony:

Mr: Fitzgerald:

Q. It was because of the defendants in this case—because Mr. Testo had told you that he had borrowed some money from Mr. Coppola, and that was one of the reasons you didn't want to testify, because of that?

A. He said that they were big shots.

Q. Who said that?

A. Mr. Testo.

Q. He told you they were big shots?

A. Right.

Q. Did that have anything to do about your being reluctant to testify—because they were big shots?

A. Well, yes. At the time it did.

Q. What was that?

A. Well, I didn't know. I don't like to get involved into anything, you know. (599)

This was the very last testimony presented to the jury. After the jury was excused the Court refused to let Mr. Jacobs, for Coppola reopen examination to ask Mr. Gulli questions concerning Mr. Heyman's last question. (602)

Defendant Coppola was denied the opportunity to properly prepare the record in order to raise this issue on appeal. Both his motions to examine Gulli and for a mistrial were denied. (602)

It is clear that the prosecution may not offer "any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson vs. United States* 335 U.S. 469, 475, (1948) The reason for this rule is not that such evidence is irrelevant.

> "On the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."
>
> *Michelson*, 335 U.S. at 476.

The clear implication of Mr. Heyman's question—and it is important to note this was his *last* question—was that because of the *character and reputation* of the defendants, a witness was reluctant to testify. Surely the very fact that the defendants were charged with a crime did not help their reputations. Jurors must always have suspicions about the character of those on trial—particularly when one of the defendants—Coppola—does not testify. When the final witness stumbles and stammers around, as Mr. Gulli did, about why he was reluctant to testify, the jury must suppose the "real reason" is implicit in the question, if not in the answer. And the "real reason" implicit in Mr. Heyman's question is simply that the defendants were "bad fellows" and the kind of men one would expect to be dealing in stolen securities.

In view of the fact that Coppola did not testify, and that neither defendant put his reputation or character in issue,

the court should not have allowed the Government to lead its last witness through a set of questions which did bring before the jury the issue of the defendants' character and reputation. The error was compounded because, of course, the testimony did not even go to the issue of the defendants reputation for truthfulness—which was not an issue—but instead showed that a witness who knew of their reputations was reluctant to testify because of what he knew. The court should have allowed Coppola to explore this issue out of the presence of the jury, and should have granted Coppola's motion for a mistrial.

ADOPTION OF ISSUES RAISED BY AND REASONS ADVANCED FOR ISSUANCE OF WRIT ON BEHALF OF CODEFENDANT CONNELLY

The petitioner hereby joins in any and all issues to be raised and questions to be presented by the codefendant Connelly in his Petition for Certiorari which will be filed.

CONCLUSION

1. Each of the issues presented herein poses important questions of federal criminal law which should be decided by this Court.

2. The decision of the court below conflicts with this Court's mandate in *Leary v. United States,* 395 U.S. 6 (1969); *Turner v. United States,* 90 S.Ct. 642 (1970) and *Michelson v. United States,* 335 U.S. 469 (1948).

The writ of certiorari should be granted.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that court herein, being the case numbered and entitled in its docket Nos. 33538-9 *"United States vs. Gennaro Coppola,* et al." and that the judgment of the court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated this 15th day of May, 1970.

GENNARO J. COPPOLA
Petitioner

By IRA B. GRUDBERG, Esq.
Attorney for Petitioner

JACOBS, JACOBS, GRUDBERG & CLIFFORD
With him on the Petition

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

———::———

Nos. 300 and 301—September Term, 1969.

(Argued: January 5, 1970 Decided: April 17, 1970)

Docket Nos. 33538 and 33539

———::———

UNITED STATES OF AMERICA,

Appellee,

—v.—

GENNARO J. COPPOLA and JOHN W. CONNELLY,

Appellants.

———::———

Before:

LUMBARD, *Chief Judge,*
FRIENDLY, *Circuit Judge,* and JUDD, *District Judge.**

———::———

Appeals from judgments of conviction for transporting and pledging stolen securities, and conspiracy in violation of 18 U.S.C. §§2314, 2315, and 371, entered on jury verdicts of guilty, in the United States District Court for the District of Connecticut, William T. Timbers, *Chief Judge.*

Affirmed in part and reversed in part.

———::———

* Sitting by designation.

LESLIE BYELAS, Assistant United States Attorney (Stewart H. Jones, United States Attorney for the District of Connecticut, on the brief), *for appellee.*

DAVID BROILES, New Haven, Connecticut (Howard Jacobs, on the brief), *for appellant Coppola.*

DONALD G. WALSH, New Haven, Connecticut (James R. Greenfield, on the brief), *for appellant Connelly.*

———::———

LUMBARD, *Chief Judge*:

Gennaro J. Coppola and John W. Connelly were tried pursuant to two indictments. The first, #11932, consisted of three counts: (1) transporting stolen securities into Connecticut in violation of 18 U.S.C. §2314; (2) receiving, concealing and pledging stolen securities in violation of 18 U.S.C. §2315; and (3) conspiring to do the above in violation of 18 U.S.C. §371. The second indictment #12085, charged the appellants with one count of conspiracy to transport the stolen securities out of the State of Connecticut. At the close of the evidence, before the case was submitted to the jury, the conspiracy count of the first indictment was dismissed on motion of the government. The jury convicted the appellants on the two substantive counts of the first indictment and the conspiracy count of the second indictment. Coppola was sentenced to ten years and fined $10,000 on each of the substantive counts and five years and fined $10,000 on the conspiracy

count; Connelly was sentenced to five years and fined $5,000 on each substantive count and fined $5,000 on the conspiracy count, all sentences to run concurrently.

Appellants claim error by the trial judge in: (1) allowing the jury to infer transportation of the stolen securities from the fact of possession, and (2) permitting the jury to find that a conspiracy to transport the bonds out of Connecticut existed. We hold that the jury was properly instructed regarding the inference of transportation from the fact of possession. However, the evidence was insufficient for the jury to find that the appellants conspired to transport the securities out of Connecticut. We affirm the convictions under the first indictment, #11932, and reverse the conspiracy conviction under the second indictment, #12085.

The charges arose out of a series of events in February and March, 1967, centering around the efforts of Anthony Testo, named a co-conspirator but not a defendant, to save his failing drugstore business. Testo owned and operated four drugstores in the Bridgeport-Fairfield, Connecticut area and was deeply in debt. He had applied to the Small Business Administration for a loan but had received no response. Coppola, having loaned Testo $3,000 on February 1, was aware that Testo was in dire financial straits and offered to supply Testo with bonds that could be used as collateral for loans. Testo accepted the offer and on February 23, Coppola delivered a $5,000 Federal Intermediate Credit Banks Bond to Testo who took it to the Mechanics and Farmers Bank and pledged it for a loan of $3,500. He then gave Coppola $1,000 in cash for supplying the bond. Testo needed still more money and after several more meetings with Coppola, Coppola gave Testo addition-

al bonds, consisting of a Dormitory Authority of New York bond, a Turnpike Authority of Kentucky bond, and two Commonwealth of Puerto Rico bonds.

Connelly was present on at least four occasions when Testo and Coppola met, often driving the car in which Coppola was riding. Coppola introduced Connelly to Testo as "my partner John."

The scheme came to an abrupt end when Testo attempted to pledge three matured Federal Intermediate bonds. The bank suggested he redeem the bonds at face value rather than pledge them as security for a loan of a lesser amount, but Testo refused and asked for all three bonds back. The bank returned two bonds but retained one as additional collateral for a previous loan. The matured bond which was retained was a $10,000 Consolidated Collateral Trust Debenture of the Twelve Federal Intermediate Credit Banks, issued under the authority of the Federal Farm Loan Act and redeemable at any Federal Intermediate Credit Bank, Federal Reserve Bank or Branch, or any agency as the Twelve Federal Intermediate Credit Banks may designate. Coppola, upon learning of the incident at the bank, told Testo that he should have retrieved all three of the bonds.

Its suspicions aroused, the bank checked the bonds and discovered that they had been stolen from the New York City investment house of Newburger, Loeb & Co. sometime between September and December, 1966. An official of the investment house testified that an audit on August 26, 1966, had disclosed no bonds missing, but audits on October 26, and December 21, 1966, did disclose some missing bonds. There was also testimony that one of the bonds in defendants' possession had been received by Newburger,

Loeb & Co., on December 5, 1966. When Testo returned to the bank on the afternoon of March 9 he was questioned by FBI Agent Clarence Smith, told the bonds were stolen, and allowed to return to his store. When Coppola called Testo that night and offered to supply additional bonds, Testo notified the FBI, and Coppola and Connelly were apprehended the next day when they arrived to meet Testo outside the bank.

The appellants argue that the jury should not have been allowed to infer that appellants transported the bonds from New York into Connecticut from the fact that they possessed the bonds. We do not agree. The jury may infer from possession in one state of property recently stolen in another state that the possessors were parties to the transportation of the property as principals or abettors. Indeed, possession of stolen goods has long been recognized to be some evidence that the possessor was the thief. I Wigmore, Evidence §152 (3d ed. 1940). The bonds were stolen within the preceding period of three to five months, and in one case apparently within two months. Further, there was testimony that the appellants had received the bonds from friends in New York City. Testo testified that Coppola told him he was going to obtain the bonds from friends in New York City (Tr. 557, 628-9), and that appellants told him that the bonds came from friends "in the City" and friends "down the line" (Tr. 575, 631).

As we indicated in *United States* v. *DeSisto*, 329 F.2d 929 (2d Cir. 1964), the possession of recently stolen goods supports an inference not merely of guilty knowledge but of participation in the theft. DeSisto had been found with several cartons of stolen goods five days after the actual theft, and the court rejected his argument that the only

inference that could be drawn from the possession of recently stolen goods is guilty knowledge and not participation in the theft. See *McNamara* v. *Henckel*, 226 U.S. 520 (1913). In *Boehm* v. *United States*, 271 Fed. 545 (2d Cir. 1921) the jury was permitted to decide whether possession four and nine months after the theft was sufficient to constitute possession of "recently" stolen goods.

Appellants base their argument that the inference was impermissible largely on the language contained in *Leary* v. *United States*, 395 U.S. 6 (1969) and *Turner* v. *United States*, — U.S. —, 90 S. Ct. 642 (1970). However, we do not think that these cases support the appellants' argument. Here the inference to be drawn is a factual one rationally supported by common sense and every day experience. In *Leary* the court stressed that the inference had insufficient basis in fact as there was and could be no showing that marihuana was always imported into the United States. See *United States* v. *Matalon*, slip opinion p. 2205 (2d Cir. 1970) for a discussion of the impact of *Turner* and *Leary* on the statutory presumption that possession of smuggled goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction. Although the test to be applied when judging the constitutionality of a statutory presumption has undergone extensive examination in *Turner* and *Leary*, we are dealing here with a long recognized rule of common law I Wigmore, *supra*, and the cases dealing with statutory inferences are not controlling. In *Matalon*, *supra*, the statute in question, 18 U.S.C. §545, allowed the jury to infer knowledge of illegal importation irrespective of the length of time elapsing between the date the goods illegally entered this country and the date the goods were found in the defendant's possession. The court indicated

that a showing of "recent" illegal importation would be necessary to support the inference that one possessed of the goods was more likely than not to be aware that the goods had been illegally imported. *United States* v. *Matalon*, slip op. p. 2210.

We come then to the question of whether the jury was properly instructed regarding the inference, and we find that it was. Judge Timbers charged:

> "This inference of interstate transportation is what the law calls a permissive inference. From the fact of possession in one state of property recently stolen in another state you may infer that the possessor transported the property in interstate commerce; but and this must be absolutely crystal clear to the jury you are not required to draw such an inference. It is entirely up to you whether you do so or not.
>
> Furthermore, in determining whether you will draw the inference here, you should consider, among other things, whether the possession of the stolen property in Connecticut, if you find 'possession' and if you find that the bonds were stolen, was sufficiently 'recent' to warrant your drawing the inference. The term 'recent' or 'recently' is a relative term which has no fact meaning. Whether property may be considered as recently stolen depends upon the nature of the property and the facts and circumstances shown by the evidence. Obviously, the longer the period of time since the theft, the less justification there is for drawing the inference."

The trial judge properly stressed the fact that the possession must be of recently stolen goods, and in several places emphasized that the appellants did not have the

burden of proving or explaining possession, saying at one point: "I hasten to add that no defendant has any burden of explaining his possession, if you find that defendants were possessed of the bonds." It was made abundantly clear to the jury that it was their decision whether or not to apply the inference and that they should only apply the inference if possession was sufficiently "recent" to justify its application.

The appellants' second point challenges the sufficiency of the evidence to prove the charge of conspiring to transport the stolen bonds out of Connecticut. We find that the evidence was not sufficient to support the charge of conspiracy. Accordingly, we reverse the convictions of both appellants on this count. A review of the evidence points up the inadequacies of the government's position.

The government proved that on March 8, 1967, Testo pledged four bonds with a face value of $20,000. The bonds, each for $5,000, were a Turnpike Authority of Kentucky bond due July 1, 2002, two Commonwealth of Puerto Rico bonds due July 1, 1970, and a Dormitory Authority of New York bond due July 1, 1994, all redeemable upon maturity at various locations outside of Connecticut. The government also introduced evidence showing that Testo was in dire financial straits and that Coppola was aware of the extent of Testo's difficulties. The government argues that from these facts the inference may be drawn that Coppola and Connelly were aware that at some future time the bonds might be expected to become a part of interstate commerce.

The government relies on *United States* v. *Mattia*, 379 F.2d 725 (3rd Cir. 1967) for support of its argument, but

in that case, the defendants in New Jersey had themselves counterfeited General Motors Acceptance Corporation Bonds with a redemption provision in New York. In the present case, however, the inference is significantly more tenuous for one must infer not only that the defendants foresaw Testo would default on the bonds, but also that they foresaw the bonds would be redeemed outside of the State of Connecticut. The pledged bonds were due in 1970, 1994, and 2002, and rather than their being redeemed out of Connecticut at some far distant time, the greater likelihood is that the bank would sell the pledged bonds on default, an action which could easily have taken place in Connecticut. If the government's theory were to prevail, every disposal of a stolen bond, with a redemption provision out of state, would also constitute a conspiracy to transport the bond out of the state. This result would strain the language of the statute and would in effect, be giving duplicate punishments for what is in essence but a single crime.

We have considered the other points raised by appellants and find them without merit. The convictions on counts one and two of indictment #11932 are affirmed and the conviction on count one of indictment #12085 is reversed. As the sentences imposed were well within the limits applicable to the convictions under the first indictment, our reversal of the conviction for conspiracy does not require a remand for resentence of the defendants.